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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1957

No. 458

McALLISTER LIGHTERAGE LINE, INC.,
Respondent,

against

INSURANCE COMPANY OF NORTH AMERICA,
Respondent,

and

SCOTT PAPER COMPANY,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Scott Paper Company, prays that a writ of certiorari issue to review the final decision and judgment of the United States Court of Appeals for the Second Circuit, filed May 29, 1957, reversing a final judgment entered in the United States District Court for the Southern District of New York on July 30th, 1956 and amended on August 1st, 1956 in favor of the plaintiff and against the defendant, Insurance Company of North America, in the amount of $20,000.00, and in favor of the plaintiff and against the defendant, Scott Paper Company, in the amount of $3,456.19, and directing the entry of judgment against Scott Paper Company in the amount of $20,000.00, and

dismissing the complaint against the defendant, Insurance Company of North America.

The opinion of the Court of Appeals is reported at 244 F. 2d 867 and is printed at pp. 1A-9A of the Appendix.

Jurisdiction

The judgment of the Court of Appeals reversing the judgment of the United States District Court for the Southern District of New York was entered on May 29, 1957 (R. p. 155). Petitions for rehearing by both petitioner, Scott Paper Company (R. pp. 157-161), and respondent, McAllister Lighterage Line, Inc. (R. p. 162), were denied by order entered on June 20th, 1957 (R. p. 170). The opinion is printed at pp. 10A-11A of the Appendix.

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (Sec. 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, Ch. 229, Sec. 1).

The Question Presented

May a United States Court of Appeals upon an appeal by a defendant, no appeal having been taken by the plaintiff and neither plaintiff nor defendant having moved for judgment notwithstanding the jury's verdict, set aside the jury's verdict and direct a verdict in favor of a plaintiff in an increased amount?

At the close of the trial of this case in the District Court, the case was submitted to the jury on written interrogatories and for general verdict, as a result of which the jury found a verdict for the respondent, McAllister Lighterage Line, Inc. against the respondent, Insurance Company of North America, in the amount of $20,000.00 and against the petitioner, Scott Paper Company, in the amount of $3,456.19.

A motion for judgment notwithstanding the verdict, was made only by the respondent, Insurance Company of North America. This motion and a motion made jointly by both defendants for a new trial were denied by the District Judge (R. p. 150). No motion for judgment notwithstanding the verdict was made by the plaintiff. From the judgments entered in the District Court in conformity with the jury verdicts, appeals were taken by both defendants (R. p. 146). No appeal was taken by the plaintiff.

The Court of Appeals reversed the judgment entered in the District Court and remanded, directing the entry of judgment dismissing the complaint as against respondent, Insurance Company of North America, and the entry of a judgment in favor of respondent, McAllister Lighterage Line, Inc., against petitioner, Scott Paper Company, in the amount of $20,000.00.

Constitutional Provision Involved

The action of the Court of Appeals, under the circumstances involves a question of the power of review of that Court of a matter tried by a jury, within the limitations imposed by the Seventh Amendment to the Constitution, which prescribes as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statement of the Case

Respondent, McAllister, the owner of a scow known as the No. 58, brought a civil jury action against both the petitioner Scott Paper, as charterer of the said scow, and the respondent, Insurance Company, as insurer of the said

scow, to recover damages sustained as a result of the sinking of said scow in the waters of the Delaware River on August 27th, 1953. A joint answer was filed by both defendants alleging that the scow was unseaworthy at the time of its delivery to Scott Paper under the charter and at the time the policy of insurance attached (R. pp. 148-9). Upon motion of the plaintiff, the defense of unseaworthiness pleaded on behalf of the defendant Scott Paper was stricken because of a provision in the charter party that: "The acceptance of said scow by the charterer is to be conclusive evidence of the seaworthy condition of said scow at the commencement of this charter" (R. p. 152).

At the close of the trial the case was submitted to the jury on written interrogatories. The jury's answers are summarized in the opinion of the Court of Appeals as follows:

> "1. The loss of the scow was proximately caused by Scott's negligence after the scow's delivery.
>
> 2. The reasonable cost of repairs was $23,456.19, and the market value was $20,000.00.
>
> 3. The scow was not unseaworthy when the policy endorsement was issued on August 26, 1953.
>
> 4. McAllister made representations to North America on August 26 regarding the scow which North America was justified in accepting as an assurance that the scow was then in sound condition, and McAllister was justified in doing so." (R. p. 149)

Based upon its answers to these interrogatories, the jury rendered general verdicts in favor of the plaintiff against the defendant, Insurance Company, for $20,000.00 and against the defendant, Scott Paper, for $3,456.19 (R. p. 149).

The Court of Appeals has reversed the judgment entered in the District Court finding that the scow was unseaworthy and, notwithstanding that no appeal had been taken by the plaintiff and that no motion for judgment

notwithstanding the verdict had been made by either the plaintiff or the defendant Scott Paper, has directed the entry of judgment in favor of the plaintiff against Scott Paper in an increased amount; holding that the evidence adduced at the trial supported the jury's finding that the loss of the scow was due to the negligence of Scott Paper (R. pp. 152-3), and, although there was conflicting evidence on the subject, holding that the jury's finding of a market value of the scow of $20,000.00 was justified (R. p. 154).

Action was originally brought in the Supreme Court of the State of New York, New York County, and was removed to the United States District Court for the Southern District of New York on the ground of diversity of citizenship as between the plaintiff and both defendants.

Reasons for Granting the Writ

I

The decision of the Court of Appeals for the Second Circuit is a denial to the petitioner of the right of a jury trial guaranteed by the Seventh Amendment to the Constitution.

The limitations imposed by the Seventh Amendment to the Constitution upon a United States Court of Appeals in the review of a case tried to a jury was the subject of extended review by this Court in the case of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364. In that case a verdict in favor of the plaintiff had been returned in the District Court. Upon appeal the Circuit Court reversed, and finding that there was no evidence to support the verdict, directed judgment of dismissal. The question was squarely presented to this Court whether, under the Seventh Amendment, the appellate court had the power to direct a judgment or was limited merely to reversal and remand for a new trial. This Court agreed with the Circuit Court that the evidence did not justify the verdict rendered, and upon that basis proceeded to the examination of the question,

whether under such circumstances the Seventh Amendment permitted the appellate court to direct judgment on appeal or limited it to remand for a new trial, saying (p. 376):

> "The real question is whether in the direction given by the Circuit Court of Appeals there was an infraction of the 7th Amendment to the Constitution of the United States * * *".

After reviewing the adjudicated cases, this Court said (p. 379):

> "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the rules of the common law; second, that while under those rules that Court could set aside the verdict for error of law in the proceedings in the circuit court, and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance."

The basis for the Court's decision is summed up in the following language from its opinion (p. 382):

> "In the trial by jury, the right to which is secured by the 7th Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right."

The problem received the further consideration of this Court in the later cases of *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, and *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389.

In the *Baltimore* case, the *Slocum* case was distinguished in that the trial court in the *Baltimore* case had expressly

reserved its ruling on the defendant's motions for dismissal and for a directed verdict, in accordance with the practice in the State of New York, pursuant to which practice, by Statute, such reservation constituted a reservation of the question of law whether the evidence was or was not sufficient to sustain a plaintiff's verdict. The Court noted that such practice was in conformity with the common law at the time of the adoption of the Seventh Amendment to the Constitution and, accordingly, because of the conformity of the practice to the New York State practice, held that the Circuit Court of Appeals was within its power in directing judgment of dismissal upon review. The decision did not import in any wise a departure from the underlying principles enunciated in the *Slocum* case. Thus, in the *Baltimore* case this Court said, referring to the Seventh Amendment (p. 657):

> "The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."

In the *Aetna* case, this Court distinguished the *Baltimore* case and firmly enunciated the rule that where there had not been a reservation on motions for a directed verdict, and no motion for judgment *non obstante veredicto* had been made, the Circuit Court of Appeals was without power, in view of the Seventh Amendment, to direct judgment upon review, saying (p. 394):

> "The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff."

The principle thus firmly established is applicable in the instant case. The Court of Appeals had held that the scow

was unseaworthy and, accordingly, the verdict in favor of the plaintiff against the Insurance Company was without support in the evidence. The Court has also held that the rule of damage under which the case was submitted to the jury was erroneous and that the verdict against Scott Paper, as rendered by the jury, could not stand for that reason (R. p. 153).

The defendant, Insurance Company, had moved under Rule 50(b) for judgment n.o.v., but no such motion was made by the plaintiff nor was any such motion made by the defendant Scott Paper. Because of the errors found by the Circuit Court to be inherent in the jury's verdicts, the Circuit Court was justified in reversing but, it is submitted, that within the constitutional limitations imposed by the Seventh Amendment, it did not have jurisdiction to direct the entry of a judgment in the District Court in favor of the plaintiff and against Scott Paper, as it did, for $20,000.00.

Although there were specific findings by the jury which would support a verdict against Scott Paper in an amount of $20,000.00, these findings were coupled with other findings whereby the jury had found that the scow was seaworthy and that the total of the damage sustained by the plaintiff was $23,456.19 (R. p. 102), both of which findings the Circuit Court has held were unwarranted and erroneous. Moreover, the very basis of the Court of Appeals decision that the scow was unseaworthy was that plaintiff's caulkers had failed to recaulk a seam in the bottom of the scow (R. p. 150). This failure would have a bearing on the question of the liability of Scott Paper Company. One of the specific questions submitted to the jury on the issue as to the proximate cause of the loss of the scow was whether or not it was due to negligent failure to complete caulking prior to delivery, to which the jury had answered "No" (R. p. 102). That the jury upon a new trial, where the issue of seaworthiness was removed, and where the question of the valuation of the scow in the amount of $20,000.00 in the insurance

policy (R. p. 154) was not before it, would arrive at similar findings is the purest speculation. But whether it would or not, it is respectfully submitted that Scott Paper Company has the constitutional right to have those fact issues re-submitted to a jury under appropriate instructions and charges, with the elimination of the legal errors found by the Court of Appeals to have been inherent in the first presentation.

II

The decision of the Court of Appeals is in conflict with the decisions of this Court in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571; *Fountain* v. *Filson*, 336 U. S. 681 and *Johnson* v. *N. Y. N. H. & H. R. Co.*, 344 U. S. 48.

In *Cone* v. *West Virginia Pulp & Paper Co.*, 320 U. S. 212, this Court unanimously held that in the absence of a motion for judgment n.o.v. made in the District Court under Rule 50(b) of the Federal Rules of Civil Procedure, a Circuit Court of Appeals does not have the power to reverse a judgment entered upon a jury verdict and remand for the entry of judgment in the District Court, but is limited to a remand for a new trial.

In *Globe Liquor Co.* v. *San Roman*, 322 U. S. 571, a judgment had been entered in the District Court on a directed verdict for plaintiff. On appeal the Court of Appeals remanded with directions to enter judgment for defendant. At the trial each party had requested a directed verdict. After entry of judgment on plaintiff's motion, defendant moved for a new trial but failed to move for judgment under Rule 50(b) F. R. C. P. Relying upon its decision in the *Cone* case, this Court held that even though motions for directed verdicts had been made by both parties at the trial, in the absence of a motion for judgment n.o.v., the Court of Appeals was without power to direct judgment in favor of the appellant but was limited to granting a new trial.

In *Fountain* v. *Filson*, 336 U. S. 681, relying upon its decisions in the *Globe Liquor* and *Cone* cases, this Court, on petition for certiorari, in a *per curiam* decision, granted the petition and reversed the judgment of the Court of Appeals of the District of Columbia, which had undertaken to grant judgment in favor of a plaintiff on an appeal by the plaintiff from a judgment entered in favor of a defendant upon motion for summary judgment.

In *Johnson* v. *N. Y. N. H. & H. R. R. Co.*, 344 U. S. 48, the question was again presented to this Court whether a United States Court of Appeals might, under a liberal construction of a motion to set aside a verdict, treat such motion as a motion under Rule 50(b) and upon appeal direct judgment in accordance with its decision instead of merely remanding for a new trial. This Court specifically held that in the absence of a motion made under Rule 50(b) precisely in accordance with the terms of the Rule, the United States Court of Appeals is powerless to do other than to remand for a new trial, saying (p. 53):

> "The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. See *Cone* v. *West Virginia Pulp & Paper Co.*, supra (330 U. S. at 217, 218). Poor support for its abandonment would be afforded by the mere fact that a judge makes an express reservation of a decision which the rule reserves regardless of what the judge does.
>
> "Rule 50(b) as written and as construed by us is not difficult to understand or to observe. Rewriting the rule to fit counsel's unexpressed wants and intentions would make it easy to reintroduce the same type of confusion and uncertainty the rule was adopted to end. In 1946 this Court was asked to adopt an amendment to the rule which would have given appellate courts power to enter judgments for parties who, like this respondent, had made no timely motion for judgment notwithstanding the verdict. We did not adopt the amendment then. 5 Moore Federal Practice (2d ed 1951) ¶¶ 50.01 [7], 50.01 [9], 50.11. No sufficiently persuasive reasons are

presented why we should do so now under the guise of interpretation.

"Respondent made a motion to set aside the verdict and for a new trial within the time required by Rule 50(b). It failed to comply with permission given by 50(b) to move for judgment n.o.v. after the verdict. In this situation respondent is entitled only to a new trial, not to a judgment in its favor. The judgment of the Court of Appeals is vacated and the cause is remanded to it for further proceedings consistent with this opinion.".

III

By its decision in this case the United States Court of Appeals for the Second Circuit has so far departed from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The decision of the Court of Appeals in the instant case in respect of the remand for the entry of a $20,000.00 judgment against Scott Paper Company is in direct and glaring conflict with the above cited decisions of this court, authoritatively establishing and prescribing its powers on an appeal from a judgment entered upon a jury's verdict. While the judgment of dismissal against the defendant, Insurance Company, may be within the jurisdictional power of the Court of Appeals, since a motion under Rule 50(b) had been made by said defendant, such is not the case in respect of the defendant, Scott Paper, since neither plaintiff nor Scott had moved for judgment n.o.v. under Rule 50(b).

The action of the Court of Appeals in the present case in reversing and dismissing the complaint as to the defendant Insurance Company and fashioning a verdict in favor of the plaintiff against the defendant Scott Paper Company, on the assumption that a new trial "would serve no gainful purpose" (R. p. 154), while possibly laudatory in aim to relieve the trial court of the burden of a new trial, flies in

the face of the constitutional prohibition of the Seventh Amendment, is in direct conflict with the repeated admonitions of this Court to the United States Courts of Appeal, and amounts to an arrogation to itself by the Court of Appeals of power and jurisdiction which it does not possess in a civil jury action. It is respectfully submitted that its decision in this case is so far a departure from the usual course of judicial proceedings on appeals in civil jury actions as to call for the exercise of this Court's power of supervision.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets No. 24,295, No. 145, October Term 1956, McAllister Lighterage Line, Inc., Plaintiff-Appellee *v.* Insurance Company of North America and Scott Paper Company, Defendants-Appellants, and that the decision of the said United States Court of Appeals for the Second Circuit in said case be reversed, and that your petitioner have such other and further relief in the premises as may be just.

SCOTT PAPER COMPANY,
Petitioner

By EDMUND F. LAMB
Edmund F. Lamb
Counsel

New York, New York
September 12, 1957.

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit Reversing Judgment

Opinion of the United States Court of Appeals for the Second Circuit on Petitions for Rehearing

Judgment of the United States Court of Appeals for the Second Circuit

Opinion of the United States Court of Appeals for the Second Circuit Reversing Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 145—October Term, 1956.

(Argued January 18, 1957 Decided May 29, 1957.)

Docket No. 24295

MCALLISTER LIGHTERAGE LINE, INC.,
Plaintiff-Appellee,

—v.—

INSURANCE COMPANY OF NORTH AMERICA, and
SCOTT PAPER COMPANY,
Defendants-Appellants.

Before:

MEDINA, HINCKS and LUMBARD,
Circuit Judges.

Appeal by defendants from amended final judgment entered upon the verdict of a jury, by Albert L. Reeves, *Judge*, sitting in the Southern District of New York. The Insurance Company of North America was held liable for $20,000 and Scott Paper Company for $3,456.19, for the foundering of plaintiff's scow "58" while under a demise charter to defendant Scott Paper Company. Reversed as to the Insurance Company of North America, and remanded for entry of judgment against Scott for $20,000.

FOLEY & MARTIN, New York, N. Y. (Christopher E. Heckman, of counsel on the brief), *for plaintiff-appellee.*

RAWLE & HENDERSON, Philadelphia, Pa., and Bigham, Englar, Jones & Houston, New York, N. Y. (Harrison G. Kildare, Joseph W. Henderson and Richard F. Shaw, of counsel on the brief), *for defendants-appellants.*

LUMBARD, *Circuit Judge:*

Defendants appeal from a judgment entered upon the verdict of a jury by Albert L. Reeves, *Judge*, sitting in the Southern District of New York, in the amounts of $20,000 against the Insurance Company of North America and $3,456.19 against Scott Paper Company.

This action arose out of a charter of the McAllister scow "58" to the Scott Paper Company in August 1953. McAllister delivered the "58," a wood hull harbor scow built in 1911, to Scott at its Wilmington Marine Terminal on the evening of August 25, 1953. The following day McAllister and Scott executed a written demise charter of the scow for one year at $650 per month. The terms of the charter required Scott to furnish and pay the crew and furnish all victuals, supplies and equipment. Paragraph 4 of the charter provided: "The acceptance of said scow by the Charterer is to be conclusive evidence of the seaworthy condition of said scow at the commencement of this charter." The charter party required Scott at its expense to insure with full fire and marine insurance for the protection of owner and charterer "as interest may appear" in the sum of $20,000.

Just prior to the charter McAllister had drydocked the scow for an in-going survey at its expense, including the recaulking of the hull. On August 27 the scow was loaded with 605 short tons of wood pulp, a load well within the capacity of 700 tons. During the loading Scott's bargee,

Samuel Church, found a small amount of water in the hull which he pumped out, before noon, with a gasoline pump aboard. Just before 6 P. M. he started the pump again to remove additional seepage. At 6:30 P. M. a tug proceeded to tow "58" toward the Scott plant at Chester, Pennsylvania, about 14 miles away, going down the Christiana River for three quarters of a mile with a fair current and then north on the Delaware River with increased engine speed against the ebbing tide.

The "58" was unattended because Church did not remain aboard as he had been instructed, but instead drove along the shore. Off Claymont, Delaware about 8:30 P. M. the mate on the tug noticed that "58" was listing slightly and upon going aboard a few minutes later the tug's captain found water "bursting right in." Within a few minutes the scow's rail was under water and the tug beached "58" at the ice breaker above Marcus Hook. There she sank before Church, who meanwhile had arrived from shore, could hook up a pump.

The "58" was later refloated and upon inspection at the marine railway it was found that the caulkers, working for McAllister to repair and fit the scow according to the agreement between Scott and McAllister, had neglected to recaulk a seam 18 inches long in the bottom planking. Though the seam was uncaulked for a space of 18 inches, certain interior structures reduced the clear opening to 10 inches. This much is undisputed, and from this it seems clear that the residue of old oakum left by the outfitters "blew out" as the "58" started up the Delaware River. It is undisputed that it was through the resulting 10 inch opening the "58" filled with water and sank.

Scott and North America filed a joint answer alleging that the insurance never became effective because the scow contained a hidden defect which breached McAllister's implied warranty of seaworthiness, that Scott had no knowl-

edge or means of obtaining information regarding the unseaworthy condition of the scow, and that it could not be and was not observed on reasonable and proper inspection. Secondly, it was alleged that paragraph 4 of the charter was inoperative, since it was intended to apply only to patent defects.

McAllister moved to strike the second defense on the ground that acceptance of the scow pursuant to paragraph 4 of the charter was conclusive evidence of seaworthiness, and not restricted to patent defects. Judge Clancy granted the motion and struck the defense.

At the trial before Judge Reeves and a jury, McAllister sought to prove that the sinking was due solely to the negligence of Scott. It was urged that if the barge captain had remained aboard and run the pump, the scow would not have sunk, since the opening in the seam would admit only 4,419 gallons of water per hour and the pumps could handle at least 5,800 gallons per hour.

The jury's answers to written interrogatories submitted to it may be summarized as follows:

1. The loss of the scow was proximately caused by Scott's negligence after the scow's delivery.

2. The reasonable cost of repairs was $23,456.19, and the market value was $20,000.

3. The scow was not unseaworthy when the policy endorsement was issued on August 26, 1953.

4. McAllister made representations to North America on August 26 regarding the scow which North America was justified in accepting as an assurance that the scow was then in sound condition, and McAllister was justified in doing so.

The jury returned a general verdict for the plaintiff for $20,000 against North America and $3,456.19 against Scott.

Subsequently Judge Reeves entered judgment against North America for $20,000, the face amount of the policy, and for $3,456.19 against Scott.

North America moved for judgment notwithstanding the verdict, but this motion, as well as both defendants' motions for a new trial, were denied by Judge Reeves.

North America appeals alleging that error was committed by Judge Reeves in denying its motion for judgment n.o.v. since the scow was unseaworthy when the policy was issued, and this was a breach of the policy's implied covenant of seaworthiness. Scott's appeal alleges error in Judge Clancy's striking its second defense and on the ground that the judgment entered by Judge Reeves is not supported by the evidence and excessive.

The conceded facts show that the vessel was unseaworthy. Seaworthiness is the ability of a vessel adequately to perform the particular services required of her on the voyage she undertakes. *The Silvia*, 171 U. S. 462, 464 (1898); *The Southwark*, 191 U. S. 1 (1903); *The Steel Navigator*, 23 F. 2d 590 (2 Cir. 1928); *The T. J. Hooper*, 60 F. 2d 737 (2 Cir. 1932); *Ondato* v. *Standard Oil Co.*, 210 F. 2d 233 (2 Cir. 1954). Here the "58" had an 18 inch slit in her bottom which had not been recaulked. True, when she set out on the voyage in question the hole was stoppered by the old oakum which the caulkers had failed to replace, but when the "58" was put to a normal test this residue "blew out" and the water rushed in. A vessel which requires constant pumping at virtually the capacity of her pumps in order to keep afloat is not seaworthy. Were it otherwise, seldom would a vessel be unseaworthy as it could always be said that her defects were curable by emergency measures.

The thrust of McAllister's case was that the vessel sank solely because of the negligence of Scott, in that Church's absence and his failure to man the pumps caused the damage. Though it may be true that vigilance by Church might

have kept the "58" afloat, it does not relieve the owner from the obligation to deliver a seaworthy scow. The warranty of seaworthiness attaches when the vessel breaks land. *The Steel Navigator, supra.* She is seaworthy or unseaworthy at the start of her voyage.

This unseaworthiness of the "58" precludes recovery from North America on the policy. *Richelieu & Ontario Nav. Co.* v. *Boston Marine Ins. Co.*, 136 U. S. 408 (1890); *New Orleans, T. & M. R. Co.* v. *Union Marine Ins. Co.*, 286 Fed. 32 (5 Cir. 1923); Gilmore and Black, The Law of Admiralty (1957) page 57ff. It is clear that implied in every policy of hull insurance is a covenant of seaworthiness. *The Caledonia*, 157 U. S. 124, 131 (1895); *Henjes* v. *Aetna Ins. Co.*, 132 F. 2d 715, 719 (2 Cir. 1943), cert. den. 319 U. S. 760 (1943).

Nor is North America bound by Scott's acceptance of the scow and the provision in the charter making acceptance "conclusive evidence" of seaworthiness, for this provision was entirely unknown to the insurer. On these undisputed facts it was error to leave this question of unseaworthiness to the jury. Furthermore that North America never had any intention of waiving the implied warranty of seaworthiness is further shown by the proof of the inquiries which North America made prior to insuring the scow. The jury found, in answer to a special interrogatory, that McAllister had expressly warranted in conversation with North America's representative, the seaworthiness of the scow. Captain Hansen, the marine surveyor for North America, on request of the underwriter, telephoned McAllister to ascertain the scow's condition before she was accepted as a risk. McAllister's representative assured Captain Hansen that she was in sound condition. Clearly the purpose of the inquiry was to obtain information about the condition of the scow before placing the insurance, and this was known to McAllister's employee. No other

source of information was available to the insurance company, as the vessel was then in Wilmington being loaded, and the company acted reasonably in relying on this warranty. *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, 510 (1883).

The unseaworthiness of the "58" was a breach of an express warranty of the same nature as the law implies where nothing is expressly stated. Thus the policy of insurance was rendered void, and the motion for judgment n.o.v. made by the insurance company should have been granted.

We come now to the appeal from the judgment entered against Scott. Paragraph 4 in the charter agreement drawn by McAllister and accepted by Scott reads:

> "The acceptance of said scow by charterer is to be conclusive evidence of the seaworthy condition of said scow at the commencement of this charter."

In view of this clause, Judge Clancy granted the plaintiff's motion to strike from Scott's answer the defense of unseaworthiness, holding that the language was unambiguous and that it constituted a complete waiver of the warranty of seaworthiness. Scott contends on the other hand, that this waiver should be construed to apply only to latent or hidden defects.

The general rule is that a warranty of seaworthiness attaches to every charter. But the parties to a contract of private carriage are free to bargain as they please, and the warranty will not be implied where it is waived, as Judge Clancy correctly found here, in "plain and unequivocal" terms. *Dempsey* v. *Dowling*, 11 F. 2d 15 (4 Cir. 1926); *Jordan Inc.* v. *Mayronne Drilling Mud, etc., Service*, 214 F. 2d 410 (5 Cir. 1954).

And the finding of the jury that Scott was negligent and that the loss was due to this negligence finds adequate

support in the evidence. Church was ordered to remain aboard the "58" precisely to prevent the type of damage which actually occurred. In leaving her he breached this duty and for this breach Scott is responsible. The jury was justified in concluding that if Church had remained aboard the "58" she would not have sunk. There was evidence that a hole such as appeared in the seam of the scow could easily be stoppered either with a rag or with a wooden wedge. Furthermore, the pumps aboard the "58" could have handled the leak had they been started in time and the vessel would have remained afloat. Thus Scott's liability is clear.

But the judgment as to Scott must be reversed because of the error of the district court in its award of damages. The jury in response to special interrogatories found that the market value of the "58" was $20,000 and that the reasonable cost of repairs was $23,456.19, holding North America for $20,000, the face amount of the policy issued to cover the scow; and Scott for the $3,456.19 excess.

The object of the award of damages is to restore the injured party to the same position he held before the injury. *O'Brien Bros., Inc.* v. *The Helen B. Moran*, 160 F. 2d 502 (2 Cir. 1947). Thus the customary measure of damages to be awarded for the total loss of a vessel is the market value of the vessel at the time of destruction. *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146 (1924). The plaintiff-appellee admits this, but argues that this rule applies only to cases sounding in tort, and is inapposite here, because of the contractual relationships that obtained between the parties. The argument lacks merit for the complaint and the entire thrust of the case is one of negligence and the relationships of the parties is, therefore, irrelevant.

On the other hand, Scott argues that the jury's finding of the $20,000 market value of the "58" is not supported

by the evidence. Captain Hansen, the insurer's marine surveyor, testified that the scow was worth only $7,500. On the other hand the evidence showed that the rental value of the scow was $7,800 per year; the insurance value, agreed upon by the parties, was $20,000; and the reasonable cost of repairs, as found by the jury, was $23,456.19. The jury was justified in rejecting Hansen's testimony and finding that the market value was $20,000.

The record is complete and the jury findings specific, so that a new trial would serve no gainful purpose. Accordingly, we reverse the judgment, and direct entry of judgment against Scott for $20,000, and dismissal of the complaint against North America, with costs to North America.

Opinion of the United States Court of Appeals for the Second Circuit on Petitions for Rehearing

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

McALLISTER LIGHTERAGE LINE, INC.,
Plaintiff-Appellee,

—v.—

INSURANCE COMPANY OF NORTH AMERICA, and SCOTT PAPER COMPANY,
Defendants-Appellants.

Before:

MEDINA, HINCKS and LUMBARD,
Circuit Judges.

On petitions for rehearing.

FOLEY & MARTIN, New York, N. Y., for *plaintiff-appellee.*

PURDY, LAMB & CATOGGIO, New York, N. Y., for *defendant-appellant* Scott Paper Company.

PER CURIAM.

Both petitions for rehearing are denied.

The original opinion filed May 29, 1957 is amended in the following respects: page 1548 slip opinion, lines 2-5, delete "The warranty of seaworthiness attaches when the

vessel breaks land." The Steel Navigator, supra. She is seaworthy or unseaworthy at the start of her voyage.", and substitute therefore: "With a term policy of insurance the warranty of seaworthiness arises at the time when the insurance becomes effective. See *Union Insurance Co.* v. *Smith*, 124 U. S. 405 (1888); and *Henjes* v. *Aetna Indemnity Co.*, 132 F. 2d 715 (2 Cir. 1943), cert. den. 319 U. S. 760. Here the insurance became effective on August 28, when the scow was at the Scott pier in Wilmington. The scow did not begin her first voyage for Scott until the evening of the following day."

H. R. M.
C. C. H.
J. E. L.
U. S. C. JJ.

Filed:
June 20, 1957

Judgment of the United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of May one thousand nine hundred and fifty-seven.

PRESENT:

HON. HAROLD R. MEDINA
HON. CARROLL C. HINCKS
HON. J. EDWARD LUMBARD
Circuit Judges.

McALLISTER LIGHTERAGE LINE, INC. Plaintiff-Appellant, v. INSURANCE CO. OF N. A. & SCOTT PAPER CO. Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded for entry of judgment against Scott for $20,000, and for dismissal of the complaint against the Insurance Company of North America, with costs to the Insurance Company of North America, in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk